

EXHIBIT A

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**OCT 07 2015**

ALAN CARLSON, CLERK of the Court

BY A. BOVARD DEPUTY

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF ORANGE

11 AHMED D. HUSSEIN,

12 Plaintiff,

13 SHELDON RAZIN, STEVEN PLOCHOCKI,
14 QUALITY SYSTEMS, INC. and DOES 1-10,
15 Inclusive

16 Defendants.

Case No. 30-2013-00679600-CU-NP-CJC

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**Assigned For All Purposes To:
Judge Mary Schulte
Dept.: C-06Hearing Date: September 10, 2015
Time: 1:30 p.m.
Dept.: C-06
Judge: Judge Mary Schulte
Reservation: 72189058Action Filed: October 4, 2013
Trial Date: October 13, 2015

1 Defendants Sheldon Razin ("Razin"), Steven Plochocki ("Plochocki"), and Quality
 2 Systems, Inc., a publicly traded corporation ("QSI," or the "Company," and collectively with
 3 Razin and Plochocki, "Defendants"), move for summary judgment on the basis that Plaintiff
 4 Ahmed Hussein ("Plaintiff" or "Hussein") cannot prove two essential elements of his fraud
 5 claims; i.e., justifiable reliance and damages. Plaintiff's first cause of action is for Fraud and
 6 Deceit, the second is for Constructive Fraud, and the third is for Negligent Misrepresentation.
 7 Defendants assert that "the undisputed evidence shows that Hussein did not actually or
 8 justifiably rely upon Defendants' statements, and that Hussein is unable to prove cognizable
 9 damages." Defendants argue that Plaintiff's constructive fraud claim also fails because he has
 10 not established the requisite breach of fiduciary duty.

11 The Court, having fully considered the arguments of all parties, both written and oral, as
 12 well as the evidence presented, now rules as follows: The Motion for Summary Judgment is
 13 **GRANTED**. As a matter of law, Plaintiff cannot prove he reasonably relied on Defendants'
 14 alleged misrepresentations in making his decision to hold his shares.

15 **A. Issues Framed By The Pleadings**

16 Plaintiff is one of QSI's largest shareholders and was a member of QSI's board of
 17 directors until May 2013. Defendant Plochocki was QSI's CEO for all time periods relevant to
 18 this action. Defendant Razin founded QSI, is the Company's largest shareholder, and is the non-
 19 executive chairman of the board.

20 Plaintiff alleges that he intended to sell his QSI shares, but decided instead to hold them
 21 in reliance on false misrepresentations about the Company's performance made by Defendants.
 22 This is commonly referred to as a "holder's action." Plaintiff alleges he suffered millions of
 23 dollars in losses in July 2012 when QSI's stock plummeted after QSI retracted its prior
 24 projections of 20-25% revenue and earnings growth for fiscal year 2013. Plaintiff alleges that
 25 QSI's stock plummeted by more than 35% in a single day causing him, so he claims, to suffer
 26 more than \$80 million in losses on that day alone.

27 **1. Alleged Misrepresentations**

28 Plaintiff alleges Defendants made the following false representations:

- 1) November 7, 2011: Plochocki tells *Investor's Business Daily* that "worries about flattening and saturation" in the healthcare software market "were baseless," and "there is nothing drying up and there is nothing slowing down";
- 2) January 25, 2012: Plochocki tells the board of directors (including Plaintiff) that QSI's growth was "rivalled only by Apple" and that the Company expected to achieve 30% revenue and net income growth during its 2013 fiscal year, which began on April 1, 2012;
- 3) January 26, 2012: Plochocki, on a public earnings conference call (which Plaintiff listened to), states that the QSI sales "pipeline" "continues to build to record levels;
- 4) May 17, 2012: Plochocki stated on an earnings call in connection with the release of QSI's fourth quarter and year-end results for the 2012 fiscal year that "we remain confident about the growth opportunities, as evidenced by our recent guidance for the 2013 fiscal year. We have stated that we expect revenues to increase 20 to 24%, and earnings per share to grow 20 to 25%." Paul Holt, QSI's CFO, made similar statements on this call about the expected growth and QSI's confidence in the growth;
- 5) June 26, 2012: Similar financial expectations were stated in proxy materials filed with the SEC, signed by Razin, Plochocki and five QSI directors; and
- 6) July 13, 2012: In a definitive proxy statement filed with the SEC, QSI stated that "for fiscal year 2013, we expect that revenues will increase in the 20-24% range and we expect earnings per share to grow by 20-25%."

Plaintiff alleges that contrary to these statements, QSI's revenues and net income were in fact decreasing, not increasing, and the growth projections were baseless. Plaintiff claims that QSI engages in a continuous reforecasting process based on real-time information regarding QSI's revenue and income, so it must have known the true facts regarding QSI's business performance when it made the statements.

2. Allegations Of Reliance

Plaintiff alleges that he served on the QSI board of directors, but was not privy to real-

1 time financial information and had to rely on the accuracy of the Company's public statements
 2 and the information provided to the board. Plaintiff alleges he was "completely surprised" by the
 3 retraction of the projections in July 2012 and had no idea the projections had no factual basis.

4 Plaintiff alleges that he considered selling his QSI stock, and discussed a sale of his stock
 5 with multiple potential trading partners, including Moe Cohen, Managing Director and head of
 6 investment banking at Jones Trading, Devin Hill, managing director at JP Morgan, and David
 7 Horowitz, Director at Credit Suisse, in late 2011 and early 2012. Plaintiff alleges that he
 8 disclosed the possibility of selling "some or all of his shares" in a November 10, 2011 13D filing
 9 with the SEC. Plaintiff claims that he decided to retain the stock after listening to Plochocki
 10 state on January 25, 2012, that QSI's growth was "rivalled only by Apple" and that the Company
 11 "expected to achieve 30% revenue and net income growth during its 2013 fiscal year, which
 12 began on April 1, 2012," and on January 26, that the QSI pipeline "continues to build to record
 13 levels." Plaintiff alleges that, had Plochocki not made those false representations, he would have
 14 sold his stock before March 2012.

15 **B. Defendants' Motion**

16 **1. Statements Of Undisputed Facts ("UF")**

17 Defendants' Motion for Summary Judgment (the "Motion") was accompanied by a
 18 Separate Statement of Undisputed Facts ("SSUF"), which listed the same 129 "Undisputed
 19 Facts" in support of the motion for each of Plaintiff's causes of action.

20 In response to Defendants' SSUF, Plaintiff either indicates "undisputed", or "undisputed
 21 and immaterial" as to the following Facts: 1-5, 7, 9-11, 13-20, 22-23, 28-36, 38-44, 58-62, 63,
 22 65, 66, 69-74, 78, 81, 84-91, 96, 98, 100-102, 104, 107, 110-112, 118, 119, 121, 123-125, 127-
 23 128. His other responses, purportedly raising disputed material facts, in fact do not do that.
 24 Rather, many of the responses lack evidentiary support, are argumentative in nature, or, simply
 25 refer to objections which have been overruled (discussed below).

26 Plaintiff also submitted 59 additional "disputed material facts," which are addressed in
 27 Defendants' Response to Plaintiff's Additional Disputed Material Facts. As Defendants pointed
 28 out, a large number of these Additional Disputed Material Facts are immaterial to the Motion.

1 Others are not supported by the evidence cited. Still others are misleading or incomplete.
 2 Finally, according to Defendants' Response, Plaintiff's facts H5, H6, H7, and H59 support the
 3 grant of summary judgment. Even after overruling most of Defendants' evidentiary objections
 4 (discussed below), the "disputed material facts" do not withstand scrutiny.

5 2. Defendants' Arguments In Support Of Their Motion

6 With respect to reliance, Defendants argue that in discovery, Plaintiff has failed to adduce
 7 any evidence sufficient to establish a "holder's claim" under *Small v. Fritz Companies, Inc.*
 8 (2003) 30 Cal. 4th 167. Defendants make the following arguments:

- 9 • Plaintiff admits that he had not decided to sell his shares as of his November 10,
 10 2011 Schedule 13D filing. UF ¶ 57. Indeed, Plaintiff's own expert assumed that
 11 a potential first sale would not have occurred until at least January 26, 2012—
 12 thereby abandoning the claim that he would have sold in late 2011. Ex. 94, at
 13 940-42, 945-50.
- 14 • Plaintiff has offered no evidence of specific offers to purchase his QSI shares and
 15 no evidence regarding the number of shares he would have sold, at what price, to
 16 whom or on what date. UF ¶¶ 93-111. Every one of his four financial advisors
 17 flatly denies ever having made an offer to purchase Plaintiff's shares, or ever
 18 negotiating the quantity, timing, or price of a potential sale with any counterparty.
- 19 • The undisputed evidence reveals that Plaintiff took action to maintain, and even
 20 increase, the number of QSI shares he owned during the period at issue. He
 21 purchased additional shares on November 10, 2011 (UF ¶ 69), and forced his
 22 broker to unwind a margin sale of his shares in May 2012 (UF ¶¶ 81-83).
- 23 • Plaintiff's claim that he reevaluated his decision to sell based on the challenged
 24 statements is not corroborated by anything beyond the conclusory allegations set
 25 forth in his pleadings. Plaintiff told his financial advisors that he was not
 26 interested in selling his shares (UF ¶¶ 25-27, 103, 106, 111, 122) because of his
 27 desire to launch yet another proxy contest for control of the Board. Plaintiff's
 28 unyielding and ironclad insistence that his margined QSI shares NOT be sold was

entirely driven by his plan to take over the Board, and had nothing whatsoever to do with an alleged “reliance” on financial projections that he publicly denounced.

- Hussein repeatedly challenged the accuracy and truthfulness of QSI’s statements—contradicting any assertion that he relied, actually, or reasonably, on the statements at issue. UF ¶¶ 40, 42-43, 45-55, 88-91. Indeed, Hussein voted against the very budget on which he now claims to have “relied” in deciding not to sell. UF ¶¶ 58-63, 129.

3. Plaintiff’s Evidence In Opposition To Defendants’ Motion

In opposition to the Motion, Plaintiff submits the following evidence:

- Expert Declaration of Mark Zmijewski: The declaration is pertinent to damages only.
- Hussein Declaration: Self-serving declaration regarding his detrimental reliance.
- Caforio Declaration: Counsel’s declaration attaching and authenticating evidence.

C. Motion For Summary Judgment Standard

A defendant moving for summary judgment bears an initial burden of producing admissible evidence sufficient to show that the plaintiff’s action has no merit; i.e. that, as to each cause of action, one or more elements of the cause of action cannot be established, or there is a complete defense. (Code Civ. Proc., § 437c(p)(2).) A moving defendant may point to the absence of evidence to support the plaintiff’s case. (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal. App. 4th 96, 101.) Specifically, a defendant may meet its initial burden of production by showing, through factually devoid discovery responses, that plaintiff lacks evidence to establish a necessary element of a cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 854, fn. 22.) Only after a defendant meets that burden, does the burden shift to the plaintiff to produce admissible evidence showing the existence of a triable issue as to a cause of action or complete defense.

D. The Undisputed Evidence Shows Plaintiff Did Not Reasonably Rely On Defendant's Alleged Misrepresentations

A shareholder like Plaintiff who alleges he decided to hold and not sell his shares in reliance on false representations about the company's financial performance can bring a claim for fraud under California state law. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal. 4th 167.) However, in order to avoid speculative claims by shareholders who merely contend they "thought about" selling and then changed their minds, a plaintiff bringing a holder's claim must make a *bona fide showing* of actual reliance on the representations. (*Id.* at 183-185.) "In a holder's action a plaintiff must allege specific reliance on the defendants' representations: for example, that if the plaintiff had read a truthful account of the corporation's financial status the plaintiff would have sold the stock, how many shares the plaintiff would have sold, and when the sale would have taken place. The plaintiff *must allege [and presumably prove at trial] actions, as distinguished from unspoken and unrecorded thoughts and decisions*, that would indicate that the plaintiff actually relied on the misrepresentations." (*Id.* at 184 [Emphasis added].) "Plaintiffs who cannot plead with sufficient specificity to show a bona fide claim of actual reliance do not stand out from the mass of stockholders who rely on the market." (*Id.*) "[S]uch persons cannot bring individual or class actions for fraud or misrepresentation. They may, however, be able to bring a corporate derivative action against the corporate officers and directors for harm done to the corporation. [Citation.] Because a plaintiff in a derivative action is suing on behalf of the corporation, he or she need not show personal reliance." (*Id.* at pp. 184-185.)

Here, contrary to Defendant's contentions, the evidence does show more than just "unspoken" or "unrecorded" thoughts on Plaintiff's part that he was considering selling his shares during the 2011/2012 time frame. The evidence shows that Plaintiff had actual discussions with advisors and brokers about the possibility of selling his shares during this time frame. For example, Mr. Cohen testified that Plaintiff specifically told him in 2011 or 2012 that he was considering selling his QSI shares, and that Plaintiff told Cohen he had reevaluated his decision to sell. (Cohen Depo. 38:14-17, 72:23-73:3; *see also* Mirsky Depo. 921:21-922:8

[Plaintiff raised general idea of selling his shares].) Defendants argue that because Plaintiff had not discussed with his brokers the specific price, timing, or quantity of any sale, never authorized them to begin negotiating a sale on his behalf, and no offer to purchase his shares was ever made, Plaintiff cannot prove actual reliance. However, the *Small* decision does not stand for the proposition that a plaintiff cannot bring a holder's claim unless he or she can prove that an actual sale was in the process of being effectuated, and was then canceled.

While Plaintiff does have some evidence to show he was considering selling his shares during the relevant time period, the undisputed evidence shows that Plaintiff did not reasonably (i.e., justifiably) rely on Defendants' alleged false projections and misrepresentations in deciding to hold his shares.

To establish his claim for fraud, Plaintiff must prove he *reasonably relied* on Defendants' alleged false representations. (CACI No.1900; citing Civil Code §§ 1709 & 1710; *Manderville v. PCG & S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1498.) "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.] Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact. [Citations.] However, *whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.*" (*Id.*, citing *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal. 4th 1226, 1239 [Emphasis added].)

Here, Defendants met their initial burden on summary judgment of showing that Plaintiff cannot prove the element of reasonable reliance. The undisputed evidence shows that, at the time he allegedly relied on Defendants' statements and financial projections, Plaintiff had "extensive concerns" regarding the company and extreme distrust of defendants, and had claimed to have been excluded from QSI's financial documents and decision making since 2008. (*See* Ex. 30 [November 2011 Schedule 13D]; Hussein Dec., Para. 5, 7, 8.)

Plaintiff was a sophisticated investor (Ex. 3 [Hussein Depo. 21:13-23]), the second

1 largest shareholder of QSI and was represented by counsel in connection with his SEC filings.
2 In determining whether one can reasonably or justifiably rely on an alleged misrepresentation,
3 the knowledge, education and experience of the person claiming reliance must be considered.
4 (*Hasso v. Hapke* (2014) 227 Cal. App. 4th 107, 132.) In November 2011, just prior to the time
5 Plaintiff claims he held his stock in reliance on defendants' false representations, Plaintiff filed a
6 Schedule 13D stating as follows:

7 Mr. Hussein continues to be deeply troubled by the deterioration in
8 corporate governance at the Issuer. . . . ¶ Dictatorship leads to
9 disastrous results. . . . ¶ The Issuer's board membership is
10 dominated by Mr. Razin's close associates. . . . Mr. Hussein, as
11 well as his attorney on his behalf, has written on numerous
12 occasions to comment on the board's actions as well as to request
13 additional information. The responses Mr. Hussein has received
14 were either unsatisfactory or non-existent. Mr. Hussein disclaims
15 responsibility for the board's actions because he denied any
16 meaningful input, including participation on any of the board
17 committees.

18 Plaintiff goes on to state that: "Mr. Hussein is enthusiastic about the promise of [QSI's]
19 proprietary software. . ." but is "concerned" that QSI's "financial results are adversely affected
20 by the board's failure to perform its main function of exercising meaningful supervision over the
21 development by senior management of a proposed strategic direction and resulting business plan
22 for [QSI], *evaluating the reasonableness of the assumptions underlying the budget*, and taking
23 steps to hold senior management accountable for achievement of the business plan and budget."
24 (Emphasis added.) Further, Plaintiff states he is "also concerned about the accuracy of public
25 disclosures made by the company" and that he "considered resigning from the board, but at
26 present he continues to believe that such action would be an abdication of his commitment to the
27 shareholders who have voted for him and would adversely affect his ability to safeguard the
28 significant personal investment he has made in the Issuer." Plaintiff further testified he asked for
29 backup information in connection with the company's projections, but did not receive it to his
30 knowledge. (Ex. 3 [Hussein Depo. 290:7-291:1].)

31 Plaintiff attended the May 24, 2012 board meeting and voted against the 2013 proposed
32 fiscal year quarterly budget because he "didn't have enough information. . . to base [his]
33 judgment whether this budget [was] rosy, too conservative." He felt the board "didn't have

1 enough discussion.” (Ex. 3 [Hussein Depo. 294:11-24].) This 2013 fiscal year budget and
2 projections are the very same statements upon which Hussein now claims he “relied” in deciding
3 not to sell his shares.

4 On July 26, 2012, QSI made the announcement that allegedly caused its stock to
5 plummet. Four days later, Hussein issued a press release proclaiming that he had “warned the
6 shareholders repeatedly about the potential for poor financial results.” Hussein testified at his
7 deposition that he was “very proud” because his prediction of QSI’s financial decline “came
8 true.” (Ex. 3 [Hussein Depo. 115:19-25].)

9 In his Opposition to the Motion, Plaintiff submits a self-serving declaration contending
10 he “never had any reason to doubt the accuracy of QSI’s financial projections until July 26,
11 2012.” Plaintiff further contends that he had decided to sell his shares, but then reevaluated his
12 decision because he had “confidence” in and “relied upon” the statements made by Defendants.
13 (Hussein Decl. 16-19.) Plaintiff contends he “would have sold [his] 9,333,700 QSI shares” had
14 he known that QSI’s statements were false. (Hussein Decl. 20-23.)

15 Plaintiff’s Declaration is insufficient to raise a triable issue of fact on the issue of
16 reasonable reliance because, in light of the undisputed evidence of Plaintiff’s long standing battle
17 with, and extreme distrust of, QSI’s leaders, along with Plaintiff’s sophistication and desire to
18 seek control of the board, reasonable minds could not conclude that Plaintiff relied on any
19 statements made by Defendants in deciding to hold his shares.

20 As noted above, while the reasonableness of a party’s reliance is ordinarily a question of
21 fact, the issue may be decided as a matter of law if reasonable minds can come to only one
22 conclusion based on the facts. Here, reasonable minds could not conclude that Plaintiff
23 reasonably relied on Defendants’ projections and statements in deciding to hold his shares. The
24 undisputed material evidence shows Plaintiff was a sophisticated investor who had a long history
25 of deep distrust for Defendants, their ability to manage the company and their willingness to
26 provide truthful information about the company. (UF 49-57, 62-63, 88-91, 125, H5-H7; Hussein
27 Dec., Para. 5, 7, 8.)

28 Plaintiff’s self-serving declaration in opposition that he “never had any reason to doubt

1 the accuracy of QSI's financial projections until July 26, 2012," decided not to sell his shares
2 because he had "confidence" in and "relied upon" the statements made by Defendants, and
3 "would have sold [his] 9,333,700 QSI shares" had he known that QSI's statements were false is
4 insufficient to raise a triable issue of fact on the issue of reasonable reliance.

5 Because the Court finds that Plaintiff could not have justifiably relied on Defendants'
6 alleged misrepresentations, the Court does not analyze whether Plaintiff failed to prove
7 cognizable damages.

8 **E. Evidentiary Objections**

9 **1. Plaintiff's Evidentiary Objections**

10 Overruled. While the Court generally does not invite "responses to objections," the
11 responses offered by Defendants were helpful to delineate the purpose for the offered testimony,
12 which frequently was a non-hearsay purpose, and as well as to provide the chain of
13 authentication.

14 Objection to Vale declaration is overruled. Vale lays the foundation for Exhibits 21 and
15 31, referenced in Defendants' UF's 37, and 58-62. Additionally, the Court notes that for 58-62,
16 Plaintiff's responsive Separate Statement says, "Hussein does not dispute the immaterial 'fact'
17 stated, but the only evidence provided by Defendants is inadmissible. See, Objection 4." Thus,
18 he does not dispute those facts cited in 58-62. In any event, these are not facts on which the
19 Motion stand or falls. For UF 37, Plaintiff's responsive Separate Statement says "Disputed but
20 immaterial," also citing to his evidentiary objection.

21 Objection (orally stated at the hearing to the entire declaration) to Supplemental
22 Declaration of Andrew Gray (Exhibits 95-101) is overruled. None of these exhibits are
23 referenced in Defendants' SSUF. Exhibit 96 for example (referenced in Gray supp. Paragraph 3)
24 responds to new evidence in Plaintiff's Opposition, (*see* page 10 lines 7-9 of Reply). Exhibit 95
25 adds context to Cohen's testimony (*see* Defendants' Response to Plaintiff's Additional Disputed
26 Facts, H 17-H18, H22). Exhibit 98 impeaches Hussein with deposition testimony (*see*
27 Defendants' Response to Plaintiff's Additional Disputed Facts, H30). Otherwise, these exhibits
28 are not a critical part of the Reply.

1 **2. Defendants' Evidentiary Objections**

2 Sustained as to Nos. 3 and 4 only; otherwise overruled, the remaining testimony is an
3 issue of weight rather than admissibility. Also, objections 1 and 2 do not state the content of the
4 objectionable testimony, as required by CRC 3.1354.

5 Accordingly,

6 **IT IS ORDERED** that Plaintiff's evidentiary objections are overruled, as stated in the Court's
7 September 15, 2015 order and above.

8 **IT IS FURTHER ORDERED** that Defendants' evidentiary objections number 3 and 4 are
9 sustained, and that the remainder of Defendants' evidentiary objections are overruled.

10 **IT IS FURTHER ORDERED** that Defendants' Motion for Summary Judgment is granted and
11 that Plaintiff's Complaint is dismissed with prejudice.

12 **IT IS FURTHER ORDERED** that the parties attend a status conference to address the status
13 and expected schedule for Defendants' Cross-Complaint against Plaintiff Ahmed Hussein on
14 November 10, 2015.

15 **IT IS FURTHER ORDERED** that Defendants submit any motion for reasonable costs under
16 California Code of Civil Procedure § 1033.5 within 15 days after the date of mailing the notice
17 of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the
18 date of service of written notice of entry of judgment or dismissal, or within 180 days after the
19 entry of judgment, whichever is first.

20
21 **IT IS SO ORDERED.**

22
23
24 Dated: 10/7/15

Mary Fingal Schulte
Honorable Mary Fingal Schulte
Superior Court of California

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 650 Town Center Drive, Floor 20, Costa Mesa, CA 92626.

On **October 1, 2015**, I served the following document described as:

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

by serving a true copy of the above-described document in the following manner:

BY ELECTRONIC MAIL

The above-described document was transmitted via electronic mail to the following party on **October 1, 2015** at approximately 2:15 p.m.:

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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 1, 2015**, at Costa Mesa, California.

/s/ Jana Roach

Jana Roach